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ABSTRACT

The meaning of the Supreme Court's decision affirming the rights of undocumented alien children to attend public schools free of charge and the impact of this and recent decisions on other issues relating to national origin minority students are discussed in this memorandum. Among the other issues are the status of non-immigrant children legally present in the country, a school district's rights and responsibilities in the matters of student visas, I-20's, and English language proficiency, and the meaning of the term "national origin discrimination." (CMG)

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TO: Clients and Colleagues

FROM: Rosa Castro Feinberg, Director

RE: Alien Children's Right to a Free Public School Education

In light of the Supreme Court decision of June 15 affirming the right of undocumented alien children to attend public school free of charge, a number of questions concerning the scope and effect of that decision, and concerning the effect of the decision on related issues, have been asked of the Center. Our legal consultant, Peter M. Siegel, Esq., has prepared this memorandum which discusses the meaning of the Supreme Court's decision, and the impact of it and other recent decisions on issues relating to national origin minority students.

1. Must undocumented alien children receive a free public education?

Yes. On June 15, 1982, the United States Supreme Court held that undocumented alien children cannot be denied a free public education because such a denial would violate their constitutional right of equal protection. Plyler v. Doe, 50 Law Week 4650 (1982). Because Plyler is a decision of the United States Supreme Court, it is binding on all school districts in all states. It is the law of the land and must be adhered to.

A brief explanation of the facts and of the law applied in Plyler may be helpful. In 1975 the Texas Education Code was amended to bar the use of state funds for the education of undocumented alien children. Local school districts could either bar undocumented aliens entirely, or admit them to public school upon payment of a tuition charge. The Tyler Independent School District implemented the Education Code by requiring undocumented alien children to pay a tuition charge of $1,000 per year, thus effectively barring them from the school system.

The alien children claimed that their exclusion from public school violated the Supremacy Clause, the Equal Protection Clause, and the Due Process Clause of the United States Constitution. The Supremacy Clause precludes state laws that interfere with the accomplishment of federal objectives. The United States District Court agreed with the alien children that state efforts to impose what amounted to punishment upon undocumented aliens conflicted with a comprehensive federal scheme for immigration and naturalization. Therefore, it held that the state law was invalid. The Court also held that the Texas School Code exclusion violated equal protection because the discrimination embodied in the law was not supported by a rational basis. The Court of Appeals held that the statute was not preempted by federal law, but agreed that the law violated equal protection.

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The Supreme Court dealt only with the equal protection issue. The Equal Protection Clause mandates that all persons similarly circumstanced be treated alike. The Texas Education Code created two classes of school children: those who were citizens or legally resident alients, entitled to free schooling; and those who were undocumented and were not entitled to free schooling. In testing the validity of classifications, the Supreme Court applies a two-tiered method of analysis. If the challenged law affects a suspect class or threatens fundamental rights, strict judicial scrutiny is applied and the law is approved only if it is precisely tailored to further a compelling governmental interest. If the challenged law neither affects a suspect class or threatens a fundamental right, the law need only bear a rational relationship to a legitimate state interest.

Based on prior decisions, the Court held that neither a suspect class or a fundamental right was involved. The Court, therefore, looked to the rationality of the Texas law. The Court noted that "persuasive arguments support the view that a State may withhold its beneficience from those whose very presence within the United States is a product of their own unlawful conduct" (50 Law Week p. 4655). But the children of illegal aliens have not engaged in any unlawful conduct. The Court found that:

> Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.
>
> > "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concepts of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual--as well as unjust--way of deterring the parent."
>
> It is thus difficult to conceive a rational justification for penalizing these children for their presence within the United States (50 Law Week p. 4655).

In analyzing the rationality of the Texas law, the Court stressed the importance of education in sustaining our political and cultural heritage, noting that the "denial of education to some isolated group of children poses an afront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." (50 Law Week p. 4655) The Texas law imposed a lifetime hardship on a group of children not personally at fault for their undocumented status. The Court said:

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute even in the smallest way to the progress of our Nation. In determining the rationality of [the Texas law], we may appropriately take into account its costs to the Nation and to the innocent children who are victims. In light of these countervailing costs the discrimination contained in [the Texas law] can hardly be considered rational . . . (50 Law Week p. 4656).

Texas attempted to justify the rationality of its law in a number of ways. First, it argued that the undocumented status of the children was sufficient, in and of itself, to constitute a rational basis for denying them an education. Noting that immigration and deportation are matters of federal law, the Court said:

> But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen . . . . In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would, of course, be most difficult for the State to justify a denial of education to a child enjoying inchoate federal permission to remain (50 Law Week p. 4656).

Texas also argued that its law protected the state from an influx of illegal immigrants. The Court pointed out that the dominant motive for illegal entry is the availability of employment, not education. "Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration" (50 Law Week p. 4657). To Texas' arguments that illegal immigrant children adversely impacted upon state financing and quality of education, the Court responded: "Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children." (Ibid.) The Court concluded that Texas had failed to show a substantial state interest which would support its bar of a free public education to a group of innocent children.

The majority opinion of the Court utilized traditional legal protection analysis. Two justices concurred in the decision of the Court, but believed that the extraordinary importance of education made the Texas School Law unconstitutional. Justice Blackman stated:

> In my view, when the State provides education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with . . . the purposes of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group--through the State's action--they will have been converted into a discrete underclass. Other benefits provided by the State, such as housing and public assistance, are of course important: to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are in a sense unique, for they, strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. (50 Law Week pp. 4658-4659)

Justice Powell also wrote a concurring opinion which stressed the importance of education and the impossibility of reconciling a statutory scheme that singles out some children for a life long penalty and stigma, and threatens the creation of an underclass of future citizens and residents, with the fundamental purpose of the Fourteenth Amendment.

The irrationality of a school district attempting to exclude children in need of education is obvious. That it required the Supreme Court to put an end to such attempts does no credit to our educational and political system. Hopefully, school systems will all recognize that all children require an education--certainly the Supreme Court so recognizes.

2. Are undocumented alien children residents of the school district in which they reside?

Yes. The decision in Plyler makes it clear that school districts cannot argue that as a matter of law, an undocumented alien cannot establish residence in a particular school district. The Court held that: "It is thus clear that (the School District's) residence argument amounts to nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling their children in the public schools. A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as non-resident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State", (50 Law Week p. 4657). In other words, in determining residency for purposes of school admission, the school district must treat undocumented alien children in the same manner as it treats all of its children. Or to put it another way, in determining residency, the immigration status of the student and his parents is totally irrelevant.

3. Can school districts compel students to document their immigration status?

No. As the Court makes clear in Plyler, the state, and thus school districts, play no role in the enforcement of the immigration laws of the United States. Thus, the status of the child is irrelevant.

4. Must school districts provide free public education to non-immigrant children legally present in the country?

Yes. In only one case has a Court actually considered the legality of a state's action in limiting the right of documented alien children to a free public education. Hosier v. Evans, 314 F.Supp. 316 (D. V. I. 1970). Hosier was an action by school age children who were all lawfully in the Virgin Islands as "non-immigrant" visitors. They were being excluded from the Virgin Islands public schools because, as temporary visitors, they were not entitled to public schooling. Rejecting this argument, the Court held:

> We are here dealing with an aspect of twentieth century life so fundamental as to be fittingly considered the cornerstone of a vibrant and viable republican form of democracy, such as we so proudly espouse, i.e., free and unrestricted public education . . . . I hold that public education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."
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> * * *
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> It cannot be gainsaid that it is manifestly contrary to the public good in this territory to develop and foster a ghetto of ignorance, with countless numbers of untrained, untutored and perhaps untended children (since their parents are bonded workers) roaming the streets, this with the concommitant evils of crime, immorality and general social degeneracy. In the public interest a generation of illiterates is to be avoided, whatever the financial cost. I am of the opinion that the most compelling of public concern militates in favor of the prompt admission of these plaintiffs, and all others of their class, to the public schools. (314 F.Supp. pp. 319, 321.)

There are at least 24 types of non-immigrant visas. They range from visas for ambassadors, to workers to students. The definitions are found in Title 8, Section 1101 of the United States Code [8 U.S.C. §1101(15) et seq.] The Supreme Court has recently considered whether aliens who come to the United States on non-immigrant visas can establish residence or domicile for purposes of availing themselves of state benefits. The case at Toll v. Moreno, 102 S.Ct. 2977 (1982) concerned students, whose parents had non-immigrant alien visas, who were denied instate tuition and fees at the University of Maryland. The state argued that, because of their non-immigrant status, the alien children could properly be denied resident status. In other words, the state argued that because the alien had not been admitted to the United States for permanent residence, the alien could not lawfully establish a Maryland domicile. The Court rejected this argument, noting that many classes of non-immigrant aliens were not barred by federal law from establishing domicile in the United States.

Invoking the Supremacy Clause, the Court found that State regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress. Since the aliens were entitled, as a matter of federal immigration law, to establish a United States domicile, the imposition of out-of-state tuition charges constituted an impermissible "burden", whose imposition was contrary to the Supremacy Clause of the Constitution.

The decision in Toll v. Moreno, is based on the court's careful reading of the definitions of non-immigrant aliens, as set forth at 8 U.S.C. §1101(15). That section defines some 24 different classes of aliens entitled to enter the United States as non-immigrants. For each class, the law indicates whether or not the alien, when receiving a visa, must demonstrate that he has "a residence in a foreign country which he has no intention of abandoning". According to the Supreme Court decision in Toll, only those aliens who must make this showing as a condition of securing a visa are precluded, as a matter of law, from establishing residence or domicile in the United States.

The inability to claim residence or domicile applies to a very narrow group of aliens. It applies to Section 1101(15)(b) aliens who are in the United States temporarily for business or temporarily for pleasure. It applies to Section 1101 (15)(f)(i) aliens who are in the United States as bonafide students. It also applies to Section 1101(15)(h) aliens, who come to the United States to perform exceptional services, such as university visiting professors. Finally, the disqualification applies to an alien entering pursuant to Section 1101(15)(m)(i), who comes to the United States to pursue a full course of study at an established vocational or other recognized non-academic institution.

Many aliens entitled to non-immigrant visas are also entitled to bring their spouse and children. For example, bonafide students enter as Section 1101(15)(f)(i) immigrants, disqualified from establishing domicile here. But, their spouse and children enter as Section 1101(15)(f)(ii) non-immigrants and nothing in that subsection bars them from establishing domicile.

Besides their federal entitlement to establish domicile, non-immigrant aliens who were lawfully admitted can adjust their status to that of permanent resident alien. Just as in Plyler v. Doe, where the Court was careful to point out that the children's undocumented alien status did not, of necessity, mean that they will be deported, so too with respect to lawfully admitted non-immigrant aliens. They may apply to lawfully change their status, or they may unlawfully overstay their visas. In any case, the issue is one for the federal government and not for state government or local school districts.

In the case of Williams v. Williams, 328 F.Supp. 1380 (D. V. I. 1971) the Court recited the well-known rule that to acquire domicile in a place, a person must be there physically present and have an intent to make that place home. The plaintiffs in the Williams case, who were seeking to establish domicile as a jurisdictional prerequisite to the securing of a divorce, asserted that they had formed the intent to make the Virgin Islands their home. Such as an intent appeared inconsistent with the conditions under which they were admitted, i.e., "having a residence in a foreign country, which he has no intention of abandoning." The Court rejected the argument that the terms of the aliens' visas precluded the acquisition of domicile, stating:

> Even assuming the least favorable situation, where an alien has misrepresented his true intent at the time he was granted entry to the country, the fact that he may be illegally in the country and deportable would not preclude him from forming an actual intent to make his home here. I see no reason to erect from the immigration laws an insuperable barrier of 'constructive' intent . . . that cannot be overcome even by proof of a person's actual intent. (328 F.Supp. at p. 1383).

The number of non-immigrant aliens who cannot rely upon the immigration law for their right to claim a United States domicile is narrow. And, those not protected by federal law may, nevertheless, in the particular facts of their circumstances, assert that they are domiciled here.

5. Does the child of a non-immigrant alien require an I-20 to attend school in the United States?

No. A child who is admitted to the United States because he is the minor child of an alien lawfully admitted as a non-immigrant requires no I-20. The I-20 is a prerequisite for the granting of a visa that permits admission to the United States. Since the child is already lawfully admitted, the I-20 has no role to play.

6. Can a school district limit the admission of non-immigrant children to those who are already English proficient?

No. The children are legal residents of the districts in which they reside. They are fully entitled to all the benefits of the school district. The Lau case compels the conclusion that an English language restriction could be violative of Title VI of the Civil Rights Act. Title VI applies to "any person." The protections are not limited to citizens or to citizens and resident aliens. They apply to all. So, too, the Equal Educational Opportunity Act does not exclude non-resident aliens from the protection of its language barrier provisions. School districts should not confuse the English language requirements of I-20 applicants (see question 8) with the schooling rights of those not requiring the I-20.

7. How do non-immigrant alien students establish residence in a school district? Are the requirements different?

No. It is clear after Plyler v. Doe that district residency is determined in the same manner for all students. The immigration status of a particular student, whether a resident alien, a non-resident alien, or an undocumented alien, is not relevant. The school district must utilize its normal procedure, procedures in which immigration status has no role.

Residency, as used in law and regulations determining eligibility for state benefits such as schooling, is generally taken to mean domicile. In other words, the two words are essentially interchangeable. The standard test for domicile is actual physical presence plus an intent to continue to reside in the area for the foreseeable or indefinite future. With the issue of alien status removed, the determination of domicile is a simple and routine matter. Essentially, the place where a person makes his home is his domicile.

8. Can a school district refuse to issue an I-20 because of lack of English proficiency?

Yes. Aliens not within the United States have no claim on our constitutional protection. They have no right of admission to the country. Rather, their admission is a matter of sufferance, conditioned on appropriate federal legislation. The law that requires English proficiency for the issuance of an I-20 is valid. The local school district has no obligation to accept a non-English proficiency I-20 applicant. Of course, the local school district cannot pick and choose among I-20 applicants whose English language proficiency, or lack of proficiency, is similar. A local school district could refuse to issue an I-20 for all non-English language proficient applicants, but it cannot do so for some and not others.

Although a school district need not accept I-20 applicants who are not English language proficient, it can do so. Federal regulations (22 C.F.R. §41.45(a)(3)) require that student visa applicants have:

> Sufficient scholastic preparation and knowledge of the English language to enable him to undertake a full course of study in the institution of learning or other places of study by which he has been accepted, or, if his knowledge of the English language is inadequate to unable him to pursue a full course of study in such language, the approved school or other recognized place of study is equipped to offer, and has accepted him expressly for a full course of study in a language with which he is sufficiently familiar, or special arrangements have been made by the accepting institution or other place of study for tutoring the applicant in the English language.

Although a school district has no obligation to accept any I-20 student, or to accept any non-English language proficient student, it cannot pick and choose. For example, if it accepts students from French or German-speaking countries, it must also accept students from Spanish-speaking countries. Local school districts must also remember that I-20 requirements apply to individuals not currently residing in the country who seek to use an I-20 as a prerequisite for obtaining a student visa for purposes of entering. Individuals who already reside within the country do not require an I-20 to enroll in a school.

9. What is meant by the term "national origin discrimination"?

According to the United States Supreme Court, in the case of Espinosa v. Ferra Manufacturing Company, 414 U.S. 86, 38 L. Ed.2d 287 (1973) the term national origin refers to the country where the person was born, or more broadly, the country from which his or her ancestors came. It does not refer to a person's status as an alien or as a citizen. For example, as in the Espinosa case, an employer could discriminate by refusing to hire a non-citizen, but an employer could not discriminate by refusing to hire Mexican-Americans while at the same time hiring Canadians. Lack of citizenship cannot be used as a subterfuge to, in fact, engage in national origin discrimination.

The protection afforded by Title VI of the Civil Rights Act and other laws which prohibit discrimination based on national origin, apply to any person within the United States. United States citizens are protected. Non-citizens, whether legally or illegally within the country are protected. Individuals who are not physically present within the country are not directly protected by Title VI. Nevertheless, a local school district cannot discriminate based on national origin in any case.

10. Do those who reside in a school district pursuant to a tourist visa require an I-20 in order to enter school?

No. If the student has established residence or domicile, as explained in the answer to question 4, the student is entitled to admission.

11. Must a school district issue I-20s for relatives of U.S. citizens who are neither citizens of the United States nor reside in the United States?

No. A non-resident relative of a United States citizen has no student visa preference. The same rules apply to that individual that apply to all individuals who seek to come to the United States for purposes of education. Of course, U.S. citizens' relatives may have admission preferences under other sections of the Immigration and Nationality Laws. Once here, as residents, they will be entitled to admission.

12. Must I-20s be issued for non-citizens, non-resident individuals who own property within the school district?

No. Those who own property in the United States have no entitlement to a student visa that is any greater, or any lesser, than any other non-citizen, non-resident who seeks admission to the United States for purposes of education.

13. Can a school district refuse admission to a student unable to produce a birth certificate?

No. A school district is entitled to demand a birth certificate for purposes of determining the age of a student who seeks to enroll, either initially in kindergarten or the first grade, or subsequently as a transfer student. But a student's inability to produce a birth certificate cannot be used as grounds for exclusion.

There are many other ways in which a school district can reasonably satisfy itself that the student is of appropriate age. For example, pursuant to the regulations governing social security, individuals who cannot produce a birth certificate may satisfy the requirement of establishing their age by producing other documents, such as hosp' al records, baptism records, the family bible, or other family records, a statement signed by a physician or midwife who was present at birth, insurance policies, marriage or divorce records, or immigration or naturalization records, among others. 20 C.F.R. §404.716. Other alternatives, including affidavits of family members or friends or school records, would also be sufficient.

14. Is discrimination based on a language barrier really national origin discrimination?

Yes.

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